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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 269

SOCIEDAD VILLANUEVA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS,

Petitioner,

against

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS, a Portuguese corporation, petitions for a writ of certiorari to review a judgment of the United States Court of Claims filed January 20, 1960.

Opinion Below

The opinion and judgment of the Court of Claims are reported in 180 Fed. Supp. 342 and a copy thereof is annexed hereto as Appendix A.

Jurisdiction

The judgment of the Court of Claims was dated and entered on January 20, 1960. The order of the Court

denying petitioner's motion for rehearing filed February 19, 1960 was dated and entered April 6, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255.

Questions Presented

1. Whether the Court of Claims, in assessing damages for the Government's breach of a contract for sale and delivery to it of tungsten concentrates by a Portuguese corporation may limit such damages to the plaintiff's loss of prospective profits and disregard the holding of this Court in *Burton Coal Co.* v. *United States*, 273 U. S. 337 (1927) that the amount of such profits is immaterial and that the applicable measure of damages for breach by the buyer of an executory contract of sale is deemed as a matter of law to be the difference between the contract price and the market value at the times when and the places where deliveries should have been made.

2. Whether the Court of Claims may refuse to give a plaintiff which, in reasonable reliance on the market value rule of damages established in the *Burton Coal* cases, did not attempt at the trial before the Commissioner to introduce evidence of the probable costs of performing the contract, an opportunity by remanding the case to the Trial Commissioner to present such evidence in conformity with the Court's conclusion of law, contrary to *Burton Coal* that such costs are material to the measurement of damages.

Statutes Involved

No constitutional provision, statute or regulation is involved in the questions presented by this petition.

Statement of Case and Disposition Below

Petitioner was organized in Portugal on August 21, 1951 with the purpose of marketing Portuguese tungsten and other minerals through long-term sales contracts at fixed prices. (Swan: 51(b)(c).) Its long-range objective, which had the support of the Portuguese Government, was the improvement of Portugal's national economy by the modernization and expansion of mining production and the eventual integration of substantial mining operations under its control. (31(a), (b)).

The mining of tungsten in Portugal was for the most part disorganized and primitive. The two largest mines, owned by British and French interests, supplied the bulk of the output. Few other mines were extensively mechanized. A hundred or more small producers operated their mines chiefly by hand labor. (24(c); 27(b), (d)). The location of many ore deposits at or near the surface made hand operations feasible. (24(b)(c)). These deposits were exploited by migrant workers, known as "pilhas," who collected ore from scattered concessions and sold it to local "pickers." The pickers, in turn, disposed of the ore to five or six big "dealers" in the cities. (29(a), (b), (c)).

Despite these desultory and primitive methods of mining and marketing, the industry had demonstrated its enormous potential in World War II, when tungsten was a critical material in short supply because of the unavailability to the Western powers of Asia's great sources of production. By the end of the war the Portuguese General Mining Department had certified some 800 concessions as having proven industrial value. (27(a)). National production reached a peak of 7,500 to 10,000 metric tons per year, largely contributed by pilhas, thousands of whom

were organized into stable work groups (290(c), fn. 70; 60(c)).

The post war decline in demand brought an end to the boom. At least 600 of the 800 registered concessions had closed by 1950. Production had dropped to 2500 metric tons (27(c), (d)). The pitbas were left without steady employment and the small producers without incentive to resume operations. The high spot prices induced by the Korean crisis did little to stimulate production because of the lack of confidence in their continuance, but the potential for expansion remained (28(b), (c)).

It was the basic concept of petitioner to exploit this potential in a manner which would contribute to the national economy, as well as provide profit for itself (31(a)). Incentive to the small producers to expand their production would be given by means of an assurance to them that they would be able to dispose of their increased output over a sufficient period of time to warrant operation and expansion. It appeared that such assurances of demand must take the form of a long term sales contract or contracts with payment secured by a letter of credit (31(b), fn. 7; 64(b)). Petitioner made arrangements for the purchase of mining equipment on long term credit and for the financing of production operations, against a purchaser's letter of credit, by Ultramarino Bank, which was controlled by the Government of Portugal (108(a), (b); 109(a); 152(c), fn. 58). Petitioner held options to purchase many of the mines on which it relied for expanded production (52(b)).

Petitioner's program had the approval of the Portuguese Government (146(b), (c), fn. 32). Responsible officials of that government, including the Director of its Bureau of Mines, cooperated with petitioner in the preparation

its program (66; 70(b) fn. 41; 81(c)). Executives of the company included, in addition to other prominent Portuguese citizens, the Chief of Staff of the Portuguese Army, who was Portugal's delegate to the North Atlantic Treaty Organization, and Portugal's Commissioner General of Unemployment (51(b); 146(b); fn. 41).

Upon ascertaining the need of the United States to acquire substantial quantities of tungsten for its stockpiling program, petitioner commenced negotiations looking toward a long-term sales contract. These negotiations were conducted initially with officials of the Emergency Procurement Service (EPS), a branch of the General Services Administrator (GSA), and subsequently with officials of the Defense Materials Procurement Agency (DMPA), which entered into a contract with petitioner on September 11, 1952 (51(a), (b); 54(a); 104). The provisions of this contract as contained in the findings of the Court of Claims (3(a), (b)) are printed in Appendix B to this petition.

contract required petitioner to sell and deliver to the Government a minimum of 2,970 short tons of tungsten concentrates over a period of 34 months. It required the Government to purchase from petitioner a maximum of 4,290 short tons over the same period (Article I). The contract price for maximum delivery, computed on the basis of ore having 70 per cent trioxide concentration, was $15,962,100 (156, Table 1B).

Each of the parties understood and recognized the principal purposes of the other party in entering into the contract. Petitioner knew that one of the purposes of DMPA was the expansion of tungsten production in Portugal (140(a)). This coincided with one of its own purposes as expressed to the EPS and DMPA representa-

tives" 1400(b)(1). Petitioner also knew that the Government, in addition to promoting the expansion of future sources of supply, desired to procure substantial quantities of tungsten for its stockpile program, which had been severely criticized by the Preparedness Subcommittee of the Senate Committee on Armed Services for inadequate stockpiling of tungsten (23(a), (b), (c); 74(c), (d)). The contract, unlike a development contract, committed petitioner, as the seller, only to supply specified minimum quantities within specified time periods. Petitioner's ability to obtain and deliver these quantities on time was the subject of a special on-the-spot investigation by the Government's engineer of a number of petitioner's anticipated sources of supply (80(c); 81(a); 84).

On its side, the Government recognized that petitioner did not itself own or operate tungsten mines but would act as a middleman, acquiring tungsten by purchase from producers, pilhas and other sources and reselling to the Government. It was explicitly recognized that Atlantic expected to purchase from pickers and dealers to the extent necessary to dry up the black market and would purchase from any other source if essential to fulfill its contractual commitments (67(b), fn. 37; 70(b), fn. 42; 72(a); 76(b); 84; 97(a) fn. 69; 141(a), (b), (c)).

The purposes of the parties were stated in a general way in the preamble to the contract but were not incorporated into any of the contractual obligations. The contract neither expressly nor by implication requires petitioner to develop any mine, to undertake or accomplish the expansion of production, or to purchase from any designated source. It is completely silent on all these matters.

The contract contains no provision or formula for ascertaining the damages payable in event of breach.

On October 27, 1952, six weeks after the contract was signed, before commencement of deliveries and without prior notice to petitioner, DMEA cancelled (4: 123). The stated ground was a determination that petitioner had entered "the open market" for the purchase of tungsten ores in violation of Article XX(d) of the contract, permitting cancellation in the event

> "of the determination by the Government that the Contractor obtained this Contract for the purpose of speculation."

After unsuccessful efforts to obtain reinstatement, petitioner brought this action for breach of contract (128(a), (b)).

The Trial Commissioner and the Court of Claims both found that the stated ground for cancellation was non-existent and that the Government had no other justification for its cancellation (147(a), fn. 45; Appendix A, *infra*, pages 21, 25). On the basis that petitioner could have delivered 3,630 short tons of tungsten ore (consisting of the minimum tonnage plus one half the optional tonnage), the court awarded damages in the sum of $508,200. This represented petitioner's lost profits as best the court could determine from the record before it (167(a), (b), 168; Appendix A, *infra*, page 26). It is based upon findings as to petitioner's *maximum* costs (167(b)). In particular, the findings as to cost of ore acquisition are based only upon evidence of prices to which some of petitioner's contemplated sources of supply were committed and acknowledge that substantial quantities of ore might have been acquired at lower prices (162(a), (b)).

As recognized by the court, the record is fragmentary as to petitioner's costs and profit because petitioner from

the outset of the action deemed these to be immaterial under the *Burton Coal* case and did not attempt to introduce evidence thereof. As the court stated in its findings, petitioner rested its case on *Burton Coal* so far as damages are concerned (157, fn. 67). Accordingly, petitioner did introduce evidence of the market value of tungsten ore at the place and times of delivery, and the commissioner and the court saw fit to make appropriate findings based on this evidence (158(a), (b)). Furthermore, they found that the difference between the contract price and the market value of the 2,650 short tons which petitioner would have delivered is $6,166,455.25 (160). This is the amount to which petitioner contends it is entitled as a matter of law under its contract.

In view of the incomplete state of the record as to its costs, petitioner moved the court to remand the case to the commissioner for the purpose of giving petitioner an opportunity to present evidence on its loss of profits and having the commissioner report his findings and conclusions on damages as established by the record as so supplemented. The court denied this motion without opinion by its order April 6, 1960.

The jurisdiction of the Court of Claims is based upon 28 U.S.C. Section 1491.

Reasons for Granting the Writ

1. Petitioner urges the Court to grant this writ for the reason that the decision of the Court of Claims is in conflict with the controlling decision of this Court, *United States* v. *Burton Coal Co.*, 273 U. S. 337 (1927), which established that the market value rule of damages governs claims against the United States founded on its breach of a purchase and sale agreement. The effect of the decision

below is to deprive citizens of a friendly foreign nation of the equal protection of law on which they had a right to rely in contracting with our Government because it was declared by this Court.

Like the contract here, the contract in *Burton Coal* by its terms was a purchase and sale contract. This Court so held and further held that the usual measure of damages, the difference between the contract price and market value, applied because that measure is deemed to constitute the damages which flow from the breach of a purchase and sale contract. These holdings in *Burton Coal* conform to our well founded and traditionally accepted doctrines governing transactions of sale which occur by the thousands every day and in which buyers and sellers rely on the market value rule to apply by operation of law unless they desire to contract for some other measure of damages.

In *Burton Coal* the Government had refused to accept further deliveries under its contract for the purchase of coal to be supplied by Burton Coal Co., as seller, from specifically named mines of producing companies with which it had subcontracts. The contract provided that Burton Coal Co. could furnish coal from other mines if, for any cause for which it was not responsible, it should be unable to furnish coal in sufficient quantities from the mines specified, but no such contingency occurred prior to the breach. At the time of the Government's breach the market price of coal was below the price which Burton Coal Co. had to pay the mines under its subcontracts. The Government argued that the judgment of the Court of Claims, awarding damages measured by the difference between the contract price and the market price, was erroneous because it put the company in a substantially better position than if the contract had been performed.

The damages awarded under the market value rule were tenfold greater than the difference between the Government's purchase price and the price to be paid by the company under its subcontracts.

This Court determined that there was no reason to depart from the normal rule of damages applied to purchase and sale contracts. In response to the Government's argument and its citations of construction-contract cases awarding the difference between the contract price and cost, this Court noted that the Barton contract was not for production or mining, but for the sale and delivery of coal. The selling company was bound to deliver the coal at all events and would not be excused by failure of the sources specified in the contract. Thus "in contemplation of law" it could have obtained the coal at the market prices prevailing at the times set for delivery. The cost to the company of securing the coal and the amount of its profits were expressly held to be immaterial. The Government could not complain of a judgment that left it in as good a position as if it had performed.

The holding of the court below that petitioner's damages must be measured by its prospective profits rather than by the market value rule cannot be reconciled with *Barton Coal*. The tungsten contract here, like the coal contract there, is one for sale and delivery before, not for production or mining. Petitioner was just as much bound to deliver the quantities of ore required by its contract as was Barton Coal Co. Petitioner's right under its contract to acquire ore at the market prices prevailing at the times of delivery was not even conditionally restricted, as in the coal contract, by any acceptance of an obligation to furnish ore from named sources. A comparison of the two contracts demonstrates that the argument for apply

ing the market value rule is stronger here than in *Burton Coal*. But it should be remembered that this Court did not make the application of the rule dependent upon any finding that the coal company would have purchased at market prices. On the contrary, it is clear that Burton Coal Co. was bound to deliver from the mines with which it had subcontracts. The whole point of the case and the rule is to render immaterial all elements of the performance that were prevented by the breach. Among these elements would necessarily be those relating to cost and profit.

Although the *Burton Coal* case was discussed at length in the commissioner's opinion and in petitioner's brief and argument, the court below summarily disposed of petitioner's contentions in five sentences that do not once refer to *Burton Coal*:

> "We think the plaintiff did not have the right, under the contract, to deliver tungsten bought by it in the open market, except possibly to a minor extent. It was one of the Government's prime purposes, in making the contract to make possible the opening up and development of new sources of tungsten. The contract would not have been made except for the existence of that purpose, and both parties so understood.
>
> "The obtaining of tungsten from the mines from which the parties understood that it was to be obtained, would have been more costly than buying it in the open market, after the market price went down. But, as we have said, the plaintiff was obligated to deliver tungsten from those mines." (Appendix A, pages 25, 26.)

[illegible] ... [illegible] ... [illegible] ... [

These reasons do not take this case out of the rule in *Barton Coal*. They are founded on the purposes which induced the parties to contract rather than on the contract obligations to which they committed themselves.

The purposes of the parties in making the contract have no relevance. In *Barton Coal* it was a mutual purpose that the coal be produced at one or more of three mines in Southern Illinois, but this did not bar the market value rule even though the purpose was written into the contract as an obligation of the seller which could be avoided only if production failed for reasons not under its control.

The court below clearly confuses purpose with obligation. This is analogous to confusing fraud founded on false inducement to make a contract with simple breach of contract. The former does not involve the contract obligations, and the latter does not involve the representations of purpose constituting the inducement. The contract may be read and reread without discovering the ghost of an obligation on petitioner's part to obtain tungsten "from the mines from which the parties understood that it was to be obtained."

That it was the intention of the parties to enter into a simple purchase and sale agreement, having no restrictions concerning the source of deliveries, is not only made clear by the absence of any such restrictions in the contract but in a positive way, is confirmed by Article XX(d) of the contract, permitting cancellation in the event of a determination that the contract was *obtained* for the purpose of speculation. It is certain that this clause relates only to purpose and is confined to the state of mind of petitioner when it entered into the contract. Had it been the intention of the parties, as concluded by the court below, to eliminate any mines or the market as a source for pet-

tioner's deliveries, this provision would have been written in terms of a prohibition relating to performance. The record is clear, however, that the intent of the speculation clause was to provide the Government "with a remedy against a producer who entered into a contract ostensibly to increase production but who lacked honest intention of doing so" (139(c)). By including the qualification against speculation in a clause relating to purpose only, the parties manifested their intent to exclude any like qualification of performance. Consistently with the flexibility required by petitioner in developing many new mines with unproved rates of production, the Government exacted no promise from petitioner as to how it would perform. It was required only to deliver.

Article XX(d), in essence, is nothing more than a representation by petitioner that it had the honest intention, which the court found it never lacked, to try to increase the production of the suppliers from whom it expected to purchase. But such representation of intent did not constitute a promise, and its carrying out was significantly not made a condition or obligation of the contract.

Even assuming that petitioner were obligated to deliver Ingston "from the mines from which the parties understood that it was to be obtained," which obviously can refer only to such mines as petitioner might select in its discretion for development, this does not distinguish *Barton Coal*, where the seller was obligated to deliver coal from three named mines with which it had firm subcontracts at fixed prices above market prices.

The Court of Claims has had occasion in a number of cases to apply the rule in *Barton Coal*. In *Stebel v. United States*, 108 Ct. Cl. 35, 46, 69 F. Supp. 221, 223 (1937),

holding that buyers of parts were not limited to profits they would have made on resale, it stated:

> "This market value rule is so well established that we see no justification for departing from it in this case."

Petitioner is not aware of any case in which the Court of Claims has explicitly sought to repudiate *Barton Coal* or whittle it down. In any event, it is important to grant review here so that *Barton Coal* will not be discarded by a lower court *sub silentio*.

Barton Coal not only sets forth a just and workable rule of damages, but it provides a certain and established rule on which foreign nationals as well as citizens of this country should be entitled to rely in entering into contracts with the United States. Adjudication of the Government's breach brings little satisfaction to an injured claimant deprived under existing law of his full measure of damages. Review of this decision is essential to prevent future dependence on a supposed rule of law which in actuality may no longer be available.

2. If the Court should decide not to review the question presented as to the correct rule of damages, petitioner requests it to consider whether, in view of petitioner's justified reliance on the *Barton Coal* case, the Court of Claims did not abuse its discretion in refusing to remand the case to the commissioner to take additional evidence on damages. The inadequacy of the present judgment of $508,200 is implicit in the fact that it affords a profit of less than 4 percent of the contract price of $13,359,500. The findings themselves recognize that the assumed costs of performance were maximum costs, that substantial

quantities of ore might have been acquired at prices below the figure taken as cost of acquisition, and that the anticipated remission of Portuguese export taxes for use in financing the mechanization of mines gave rise to a high profit potential (Pet. App. 7a). Justice demands that petitioner be afforded an opportunity to establish the full amount of its damages on the basis which the court has adopted, but which petitioner could not reasonably be expected to foresee.

Remand in this case would follow the procedure adopted in *Philadelphia Park Amusement Co. v. United States*, 126 Ct. Cls. 166, 175-174 (1954), where this Court deemed it equitable to suspend judgment and remand to the commissioner for the taking of evidence and filing of a report on the question of the fair market value of an extended franchise held by the plaintiff. This value was necessary to establish the amount of plaintiff's recovery, but could not be determined by the Court from the facts before it "since the case was prosecuted on a different theory." The instant case differs from the foregoing situation only because here the record contains *some* facts on the basis of which the Court has been able to arrive at an award. But since those facts are necessarily incomplete because they were received in evidence on issues other than damages, and are so recognized by the Court, the considerations that actuated the Court in *Philadelphia Park Amusement Co.* indicate that the remand requested herein is likewise fair and equitable.

CONCLUSION

For the reasons given it is urged that the Court should grant this petition.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 22-53

(Decided January 20, 1960)

COMPANHIA ATLÂNTICA DE DESENVOLVIMENTO E EXPLORAÇÃO DE MINAS v. THE UNITED STATES

Mr. Francis A. Brick, Jr., for the plaintiff. *Mr. Mahlon F. Perkins, Jr.*, was on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a Portuguese corporation, sues the United States for breach of contract. Under the reciprocity provisions of 28 U.S.C. 2502 it has access to this court. The contract in suit was made on September 11, 1952. On October 27 of that year the United States purported to cancel the contract. The plaintiff says that the purported cancellation was nothing more than a repudiation, and therefore a breach of a valid contract.

The contract in question was for the sale of tungsten by the plaintiff to the United States, the tungsten to be delivered over a period of 34 months. The Government says that it had the right to cancel the contract, by reason of a reservation in the contract of the right to do so upon the occurrence of a certain contingency, which contingency, it

says, occurred, and also by reason of a breach by the plaintiff of a warranty, contained in the contract, against contingent fees. It also says that the plaintiff would not have been able to perform the contract, if it had not been canceled, and therefore was not damaged by not being permitted to attempt to perform it.

We have made voluminous findings of fact, which coincide with the findings made by the commissioner of this court. There were numerous witnesses, and the veracity or the proper interpretation of the testimony of some of them is questioned. The conclusion of the commissioner who heard the testimony and observed the witnesses is entitled to great weight. We shall, in this opinion, narrate the events only to the extent we deem necessary to make our discussion intelligible.

The United States desired to obtain tungsten for American industry and for stockpiling. There were many tungsten mines in Portugal, poorly equipped mechanically. A good deal of tungsten was mined by individuals, with picks and shovels, who then marketed their product through dealers. In spite of its inefficiency, the industry prospered during World War II, but when the demand slackened after the war, there was little production by the smaller mining companies, even though prices were still high in comparison to what they had been before the war.

A Portuguese enterpriser, Dr. Soares, began in 1950 to work on a plan, later developed by the plaintiff corporation, which envisaged the organization of production and marketing in such a way that there could be profitable operation of mines which otherwise would not operate. To do this it would be necessary to bring together a number

of the small mining enterprisers under one management, and to obtain long-term contracts for the sale of the tungsten which the combined operation would produce.

An American, Mr. Pulvermann, who had had extensive experience in mine management in Germany before the war, was in Portugal in 1951 to examine a manganese mine. It did not interest him, but he looked into the possibilities of mining tungsten and came to the same conclusion which Dr. Soares had previously reached. He learned of Dr. Soares' interest and discussed the problem with him for several days. Dr. Soares gave him a 60-day option for the placement in the United States or in Europe of a contract for the sale of specified tonnages of tungsten and tin.

Mr. Pulvermann went to Washington and began to explore the possibilities of selling tungsten to the Government. He discussed the subject with Colonel Westbrook, with whom he had been associated in prior activities. Pulvermann and Westbrook, after investigation, decided that there was a possibility of getting a contract from the Government for the purchase of tungsten from the plaintiff. They considered the legal arrangement which Dr. Soares' company should make for the acquisition of the tungsten which it proposed to sell, and the arrangement which they, Pulvermann and Westbrook, should make for their compensation if the venture should succeed.

Pulvermann returned to Portugal. At his suggestion Dr. Soares persuaded several high Portuguese officials to become officers of his company.

Pulvermann and Westbrook began negotiations with United States Government officials for a contract to purchase tungsten from the plaintiff. The negotiations went on from July 1951 to September 11, 1952, when the contract here in suit was signed. Formidable opposition

to the contract was offered by American representatives in France, Portugal and England. The character of Dr. Soares and his associates was questioned and investigated. The price tentatively agreed on was greatly reduced at a relatively late period in the negotiations. In April of 1952 the Government sent Mr. Lynton, an engineer selected for his competence in that field, to examine the mines from which the plaintiff expected to obtain its tungsten. Lynton made a long report, in which he concluded that the plaintiff company could obtain the tungsten to fulfill its proposed contract. He recommended that the contract be entered into. As we have said, the contract in question was finally signed on September 11, 1952.

On October 24, an American official in London, General Wilson, telephoned Mr. Larson, the official who had signed the contract on behalf of the Government and advised him that there were "very strong protests" from the American Embassy in Lisbon about the contract, and that the Embassy had informed him of definite attempts on the part of the plaintiff to purchase tungsten from sources other than sources from which the plaintiff, under its contract, was permitted to obtain tungsten. Larson asked Wilson to forward to him any "concrete evidence" which he had relating to the latter point. Wilson on the same day sent to Larson a message stating that another company, Pennsalt, had cabled that the plaintiff was offering to buy 100 tons of tungsten from it, Pennsalt, for resale to the United States. Wilson's message reached Larson on the next working day, October 27. Larson regarded the Pennsalt cable as "concrete evidence" of violation of its contract by the plaintiff, and forthwith canceled the contract, so advising the plaintiff in a letter stating that the reason for the cancella

tion was the plaintiff's attempt to buy tungsten in the open market for delivery under the contract.

At the trial of this case the Government made no effort to prove that the plaintiff had, in fact, attempted to buy tungsten in the open market to fulfill its obligations under the contract. The stated ground for the cancellation was therefore nonexistent. The Government argues that Mr. Larson had reason to believe that the stated ground existed. Whether he did or not is irrelevant. One may not repudiate his contract obligations upon the ground that he reasonably, though mistakenly, believed that the other party to the contract had breached it.

As we have said, the Government seeks to justify its cancellation of the contract on grounds other than the ground stated at the time of the cancellation. One of these is that the plaintiff would not have been able to perform the contract and that therefore the contract was a futile writing, the repudiation of which by the Government could not have harmed the plaintiff.

The ability of the plaintiff to perform the contract was the subject of discussion and investigation during the more than a year's time of negotiation of the contract. As we have said, the Government sent its own expert to study that very question and he made a detailed report recommending that the contract be made. When a party to a contract has canceled it before performance has even begun, it can hardly expect a court to exercise its conduct upon anything less than convincing evidence that the contract could not have been performed. Our findings show that we do not regard the Government's evidence as convincing.

Appendix A

The Government says that it was entitled to cancel the contract because of a violation of the contingent fee provision in the contract. This provision said:

> ARTICLE XVII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage or contingent fee.

At the beginning of the negotiations for the contract Colonel Westbrook filed with the Government officials with whom he was dealing a copy of the written agreement which he and Pulvermann had with the plaintiff covering their employment and their compensation. This agreement appointed them exclusive sales agents of the plaintiff for securing contracts in the United States, Germany and Switzerland for the sale of specified metals, including tungsten. The agreement was for a period of five years, provided for a commission of 5 percent on all sales up to specified tonnages, and retained Westbrook and Pulvermann as industrial consultants without additional compensation.

Our findings show that both these men had unusual qualifications and experience for the work which they undertook for the plaintiff. The plaintiff was a newly organized enterprise. It had no sales agency and would

not have anything to sell unless it could secure contracts which would give stability to the tungsten mining industry for a considerable period of time. It hired Pulvermann and Westbrook as its exclusive sales agents for five years in the only countries in which there was a prospect of obtaining such contracts. They worked diligently for more than a year presenting the plaintiff's offer on its merits to the numerous Government officials who took part in the negotiations. They gave valuable assistance to the plaintiff as industrial consultants concerning the plaintiff's arrangements with its proposed suppliers of tungsten. We think Pulvermann and Westbrook were bona fide employees of the plaintiff.

The Government seems to urge that to be a "bona fide employee" of one contracting with the Government one must be an employee in the master and servant sense, with power in the master to control in detail the servant's activities. That is not the status of a sales agent, who may have several employers. We think the expression "bona fide employee" in the warranty clause in the contract must receive a rational interpretation consistent with its purpose.

In the years 1949 through 1951 an extensive investigation of "Influence in Government Procurement" was carried on by the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments. Hearings before the Investigations Subcommittee of the Senate Committee on Expenditures in the Executive Departments, 81st Cong., 1st Sess., pursuant to S. Res. 52 (August 8–September 1, 1949), and 82nd Cong., 1st Sess., pursuant to S. Res. 51 (March 14–October 5, 1951). Mr. Larson, who signed the contract in the instant case, was an important witness at these hearings. At the con-

clusion of the 1949 hearings Senate Report No. 1252, 81st Cong., 2d Sess., Jan. 18, (legislative day Jan. 4), 1950, certified. Mr. Larson's testimony at the hearings, and the comment of the members of the committee show that the warranty clause in question was not intended to forbid customary and honest business practices in negotiating contracts with the Government.

In the 1949 hearings referred to above, Mr. Larson's testimony at pages 616-617 is important. He told the committee about the regulation of his agency requiring one proposing to negotiate with his agency to disclose whether he had employed a firm other than a full-time employee to solicit the contract, and to agree to furnish information to the contracting officer as requested, relating to the employment. Mr. Larson said that from that information the contracting officer can ascertain

> whether or not in each individual case it is a legitimate attorney, as the chairman has pointed out, a full-time employee, even a contingent fee operation possibly being legitimate.
>
> . . . . . .
>
> And he will make the decision then and there."

In the instant case, as we have seen, the plaintiff's agents, at the outset of the negotiations, filed their employment agreement with the Government's negotiating officials. If those officials did not "then and there" decide that the agreement would not be a violation of warranty clause which would be inserted in any contract which might emanate from the negotiations, they recklessly involved numerous Government officials, and the plaintiff and its agents, in more than a year of strenuous negotiations and great expense, to no purpose. It might be suggested that

they knew that the compensation arrangement was improper, but did not raise the question because it would be at the Government's option whether to take advantage of the impropriety or not. Of course no such diabolical thought occurred to them. Their opinion at the time must have been that the compensation arrangement was not in violation of the warranty. We are not persuaded that they were wrong. And if the interpretation of the warranty and its proper application to the instant situation were doubtful, we think it would be a great wrong to permit the Government to awaken such a "sleeper" to justify its cancellation of a contract which it purported to cancel on another ground which it cannot now defend. Nothing short of a showing that the evils which the warranty provision was intended to prevent were present in the instant situation would justify such a use of it. The evidence shows that such evils were not present.

As appears from the foregoing, our conclusion is that the Government breached its contract with the plaintiff and must pay damages for the breach. We must determine how those damages should be measured. The plaintiff urges that it had the right, under its contract, to obtain tungsten from any source, including the open market; that the market price went down substantially during the period when it would have been performing its contract; that it could therefore have bought the tungsten at the low market price and delivered it to the Government at the higher contract price; and that it is entitled to recover the difference between the two prices.

We think the plaintiff did not have the right, under the contract, to deliver tungsten bought by it in the open market, except possibly to a minor extent. It was one of the Government's prime purposes in making the contract

to make possible the opening up and development of new sources of tungsten. The contract would not have been made except for the existence of that purpose, and both parties so understood.

The obtaining of tungsten from the mines from which the parties understood that it was to be obtained, would have been more costly than buying it in the open market after the market price went down. But, as we have said, the plaintiff was obligated to deliver tungsten from those mines. At best we can determine, its profit would have been $2.00 per short-ton unit. Since that is all that it would have made if it had been permitted to perform its contract, such a judgment will compensate it for the Government's breach of contract.

The plaintiff may have a judgment for $508,200.

It is so ordered.

BARKSDALE, *District Judge*, sitting by designation; LARAMORE, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

APPENDIX B

EXCERPTS OF EX-1

3.(b) Following are pertinent provisions of the contract:

WHEREAS, the Government is desirous of promoting the development of new sources of tungsten (wolframite) concentrates and in procuring tungsten concentrates in quantity; and

WHEREAS, the Contractor is desirous of increasing the productive capacity of its tungsten mines in Portugal (including the enlargement of its milling facilities) and the productive capacity of other small Portuguese producers with whom Contractor intends to merge, consolidate, or otherwise combine its efforts to secure increased production of tungsten.

Now, therefore, in consideration of the premises and the mutual promises of the parties hereto, as hereinafter set forth, the parties agree as follows:

ARTICLE I. SCOPE OF CONTRACT. Contractor agrees to sell and deliver to the Government and the Government agrees to purchase from the Contractor not less than two thousand nine hundred and seventy (2,970) short tons (of two thousand (2,000) pounds each), but not in excess of four thousand two hundred and ninety (4,290) short tons (of two thousand (2,000) pounds each) of tungsten concentrates (WO$_3$) at the prices and upon the terms and conditions hereinafter set forth.

ARTICLE III. RATE OF DELIVERY. Contractor shall make deliveries of tungsten not less often than semi-annually at the following minimum or maximum annual tonnage rates.

Appendix B

	Maximum Short Tons	Maximum Short Tons
1st Period	550	1081
2nd Period	880	1320
3rd Period	1540	3080

ARTICLE IV. PRICE DURATION OF CONTRACT. This Contract shall be for a period extending from date of execution hereof and terminating on June 30, 1955. It is understood and agreed that the price for each short ton of tungsten concentrates delivered in each successive period during the term of the contract, shall be determined on an f.o.b. vessel Portuguese port basis, including duties, taxes and all other levies imposed by any authority other than the United States Government, and at the following rates:

1st Period, expiring June 30, 1953 $57.00 per short ton

2nd Period, expiring June 30, 1954 $55.00 per short ton

3rd Period, expiring June 30, 1955 $50.00 per short ton

* * * * *

ARTICLE VIII. WEIGHTS AND PAYMENTS. Payment of the purchase price of tungsten concentrates delivered hereunder shall be made in the following manner:

(a) The Government will establish irrevocable commercial letters of credit opened in favor of the Contractor, in the Banco Nacional Ultramarino, Lisbon, Portugal, or in such other Portuguese bank as may be named by the Contractor and is acceptable to DMPA, in United States currency to

amounts in the aggregate adequate to pay all sums due during the respective periods hereunder as such sums become due against which provisional and final drawings may be made upon presentation of sight drafts accompanied by the documents and in accordance with the terms and conditions specified in subparagraphs (b), (c) and (d) of this Article. All costs in connection with the opening of the stand-by commercial letter of credit shall be for the account of the Contractor.

ARTICLE XII. OPTION. In consideration of the undertakings of the Government under this Contract, the Contractor hereby grants to the Government an option to purchase the Contractor's entire production or any part thereof of tungsten ores/concentrates meeting the specifications as of the date said option is exercised. This option shall continue in existence for a period of five (5) years from the date the last shipment of tungsten ore called for under this Contract is delivered to and accepted by the Government.

ARTICLE XIII. CONTINGENT FEES. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this Contract without liability or in its discretion to deduct from the contract price or con-

sideration the full amount of such commission, percentage, brokerage or contingent fee.

ARTICLE XX. DEFAULT. Notwithstanding any other provision of this Contract, the Government may, by notice in writing to the Contractor, cancel this Contract or any part thereof at any time, without payment of damages or penalty of any kind for such cancellation, in the event (a) a receiver, liquidator, or trustee is appointed for Contractor or its property [illegible] of the liquidation or dissolution of Contractor, whether voluntary or involuntary, (c) default by Contractor in the performance of any of the terms, conditions or covenants of this Contract or any amendment or supplement thereto, (d) of the determination by the Government that the Contractor obtained this Contract for the purpose of speculation.

ARTICLE XXIV. CANCELLATION. Notwithstanding any other provision hereof, this Contract shall automatically terminate upon the existence of any condition or conditions preventing the performance of any of the obligations hereunder, arising from an act or failure to act of the Government of Portugal. Such acts include, but are not limited to, the failure of that Government to authorize exports required by this Contract, and its failure to issue an export license necessary for the performance of the obligations hereunder (p. 101).